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Less Law, but More Justice?: Jury Trials and Mediation as Means of Resolving Will Contests

*Ronald Chester**

"In vain thy reason finer webs shall draw,
Entangle justice in her net of law."

Alexander Pope, *Epistle 3*, 1.191 (1733)

"It becomes a wise man to try everything
he can do by words, before having to resort
to arms."

Terence, *EUNUCHUS*, iv., 7, 19.

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I. INTRODUCTION

It is not surprising that positive law is often viewed as detached from justice. Whatever its original intention, law as promulgated by the legally-trained mind often conflicts with the layman's sense of equity or fairness or, as Charles Dickens put it "If the law supposes that . . . , the law is an ass - 'an idiot.'"¹

These sentiments have, in part, led to the recent emphasis on alternative dispute resolution, as a better choice than litigation in many situations. An interesting philosophical question is raised as to whether law-training tends to crowd out the general sense of justice held by human beings. If so, lawyers and judges may be seen as poor resolvers of conflict as compared to lay mediators, or even lay juries.

One area that particularly strikes me as fertile for examining lay justice is that of will contests, which often focus on two questions that the law itself finds difficult: (1) how much influence on a testator is undue, and (2) how mentally infirm must a testator be to be unable to leave a proper will? At first blush, these questions seem well suited to the process of mediation. Furthermore, given the highly emotional nature of these diverse family issues, such mediation might be better handled, if not by lay people, then at least by non-lawyers who possess some psychological training.

Will contests based on American common law doctrines such as undue influence and testamentary incapacity offer indirect, imperfect protection for those who would otherwise be disinherited.² Faulty execution of the will or fraud may also be a ground for such contests.³

Will contests are rare events in the probate of wills, but are nonetheless events of considerable importance due to the corrosive effect on families that often attends them.⁴ While the law of will contests focuses on ensuring that the true intent of the testator is carried out,⁵ the reality

1. CHARLES DICKENS, *OLIVER TWIST* 462 (Penguin Books USA Inc. ed. 1961) (1867).

2. See Ronald Chester, *Disinheritance and the American Child: An Alternative from British Columbia*, 1998 UTAH L. REV. 1, 3 (1998) [hereinafter *Disinheritance*]. See also Ronald Chester, *Should American Children be Protected Against Disinheritance?*, 32 REAL PROP. PROB. & TR. J. 405, 407 (1997) [hereinafter *American Children*].

3. See JESSE DUKEMINIER & STANLEY JOHANSON, *WILLS, TRUSTS, AND ESTATES* 145-96 (5th ed. 1995) (discussing and presenting cases involving these doctrines).

4. See Jeffrey P. Rosenfeld, *Will Contests: Legacies of Aging and Social Change*, in *INHERITANCE AND WEALTH IN AMERICA* 173, 174 (Robert K. Miller, Jr. & Stephen J. McNamee eds., Plenum Press 1998).

5. See generally Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235 (1996).

of such contests generally centers on which members of the affected family are to receive property from the estate. This latter orientation is particularly noticeable when the contest is settled by the parties or is decided by a jury. By contrast, judges, sitting without a jury, tend to rule in favor of the will proponents due in part to their attempts to uphold the testator's intent.⁶

In a will contest, the will is presumed to be legitimate if the proponent proves that the execution of the will was in compliance with applicable statutory requirements.⁷ The contestant, on the other hand, has the ultimate burden of proof on the issue of the will's legitimacy.⁸ The contestant attempts to prove the grounds of his or her contest, often relying on the doctrines of undue influence or lack of testamentary capacity.⁹ In Professor Jeffrey Schoenblum's Tennessee study of will contests, for example, testamentary capacity and undue influence accounted for the exclusive grounds of contest in 39 of 60 cases in which the allegations could be determined.¹⁰ When fraud and forgery were alleged, they were always joined with counts of undue influence and lack of testamentary capacity.¹¹ Cases involving these two doctrines will thus be the primary focus of our inquiry.

Because the doctrines of undue influence and lack of testamentary capacity both involve some degree of mental weakness in the testator, courts often consider their elements together, even though each theory involves a separate and distinct test.¹² To this end, courts employ the "will substitution test" as the general standard for undue influence. In applying this test, a court questions whether the testator's mind was controlled by another person to such an extent that his will is in effect the will of that other person.¹³ To show that the testator's mind was under such influence, the "will substitution test" requires the contestant to prove the following four elements: opportunity, naturalness of disposi-

6. See DUKEMINIER & JOHANSON, *supra* note 3, at 158 and text accompanying notes 31-33, *infra*.

7. See Kathryn Sampson, *Burden Shifting in Will Contest Cases: An Examination and a Proposal that the Arkansas Supreme Court Reconcile Arkansas Rules of Evidence Rule 301 with its Undue Influence Case Law*, 1996 ARK. L. NOTES 93, 94 (1996).

8. See *id.*

9. See Jeffrey A. Schoenblum, *Will Contests—An Empirical Study*, 22 REAL PROP. PROB. & TR. J. 607, 647 (1987).

10. See *id.*

11. See *id.*

12. See Sampson, *supra* note 7, at 94.

13. See Trent J. Thornley, *The Caring Influence: Beyond Autonomy as the Foundation of Undue Influence*, 71 IND. L. J. 513, 517 (1996).

tion, motive and susceptibility.¹⁴

As for testamentary capacity, the testator must have, at the time of the execution of the will, the capacity to know and understand: (1) the nature of his act; (2) the nature and extent of his property; and (3) his relation to those persons who are the natural objects of his bounty.¹⁵ Professor Milton D. Green suggests that the standard of testamentary capacity is not revealed in the test created by the courts, but is rather to be found in an inarticulate standard, applied by the juries—the fairness of the will.¹⁶ Although one might take the view that judges use wide “equitable” discretion in a manner similar to that of juries,¹⁷ I am inclined to agree with Professor Green’s opinion that appeals to fairness, rather than to positive law, are more likely to emanate from the jury room than from the bench.

It is a thesis of this article that, despite the common law focus on the mind of the testator, the proper inquiry in will contests goes to the fairness of the resulting distribution, particularly as it affects children. This inquiry is directly in line with that undertaken in systems such as that in British Columbia¹⁸ and is already present to some extent in the American system, at least when disposition of the contest is by settlement or jury verdict. The inquiry, however, does run against the grain of American jurisprudence, if not always against American practice itself.¹⁹ Despite the fact that the right to contest a will before a jury has recently been eliminated in states such as California²⁰ and Massachusetts,²¹ I argue for in-

14. See *id.* at 518. Opposing this standard, Thornley proposes the following undue influence standard: First, was the testator autonomous? And second, if the testator was not fully autonomous, was the relationship between the testator and the influencer a caring one? *Id.* at 541. Thornley concludes that “only when a Court or a jury finds a negative answer to both of these inquiries should it issue a judgment of undue influence.” *Id.*

15. Michael Falkner, *Comments: A Case Against Admitting into Evidence the Dispositive Elements of a Will in a Contested Based on Testamentary Incapacity*, 2 CONN. L. REV. 616, 617 (1970). See also Milton D. Green, *Proof of Mental Incompetency and the Unexpressed Major Premise*, 53 YALE L.J. 271, 311 (1944).

16. See Falkner, *supra* note 15, at 621. A conflict arises between the “fairness test” and the “judicial test”: “The ‘fairness’ spoken of here is generally predicated on the belief that the contestant’s share should be commensurate with the closeness of his blood relation to the testator and proportionate to ‘natural’ (i.e. orthodox) estate divisions.” *Id.* The fairness test is in abrogation of the judicial test, the purpose of which is to determine whether the testator has the capacity to comprehend his actions. *Id.*

17. See *infra* text accompanying note 67.

18. See generally Chester, *supra* note 2 (both articles cited therein).

19. Cf. Ray D. Madoff, *Unmasking Undue Influence*, 81 MINN L. REV. 571, 576-577 (1997) (expressing disapproval of the doctrine of undue influence when such doctrine is used to upset testator’s intent).

20. CAL. PROB. CODE § 7200 (West 1991).

21. MASS. STAT. ch. 211 (1986) (repealing MASS. GEN. LAWS ANN. ch. 215, § 16 (1986)).

creased use of jury trials in such contests. However, the primary emphasis of this article is on family reconciliation, which may or may not follow a jury verdict; this reconciliation seems to be a goal best reached through alternative dispute resolution ("ADR"), particularly mediation.²²

The argument's chief thrust is as follows: First, the inquiry into the dead testator's true state of mind at the time of testation is necessarily fraught with uncertainty.²³ Second, such an undertaking, even if "successful," gives the dead hand of the testator control over the needs and rights of the living,²⁴ especially living children: it sacrifices family protection and unduly favors the romantic notion of "free" testation.²⁵ Third, family protection should be direct via statute, as in British Columbia's Wills Variation Act,²⁶ not indirect, as in America's use of undue influence and its kin.²⁷ Fourth, because the enactment of a statute preventing disinheritance of children may prove impossible, at least in the short term, in the United States, the courts should emphasize family protection and fairness when confronted with common law will contests.²⁸ Fifth, such an emphasis is best achieved by mediated settlements arrived at by the parties within a framework that ensures the right to a jury trial if mediation proves unsuccessful.²⁹

The repealed provisions had allowed parties in a will contest to request that the probate judge frame issues for jury trial in a probate matter. If the probate judge granted the parties' request, the issues were tried by jury in the superior court. With the repeal of this statute, parties no longer have the right to request a trial by jury in the courts of Massachusetts. See also MASSACHUSETTS PRACTICE: PROBATE LAW AND PRACTICE, WITH FORMS § 23.7 (1997).

22. Telephone Interview with David A. Dorfman, New York City Attorney (July 7, 1998) [hereinafter Dorfman Interview].

23. See DUKEMINIER & JOHANSON, *supra* note 3, at 145-97. See generally C.P. SNOW, IN THEIR WISDOM 119-123 (1974) (discussing the difficulty of proving the state of mind of the testator with regard to undue influence).

24. See LEWIS M. SIMES, PUBLIC POLICY AND THE DEAD HAND 139 (1955).

25. See Deborah A. Batts, *I Didn't Ask To Be Born: The American Law of Disinheritance and a Proposal for Change to a System of Protected Disinheritance*, 41 HASTINGS L.J. 1197, 1197-98, 1269 (1990).

26. See Wills Variation Act, R.S.B.C., ch. 435 § 2(1) (1979) (Can.).

27. See *Disinheritance*, *supra* note 2, at 28-30.

28. *Id.* at 34-35; but cf. Madoff, *supra* note 19, at 619-20 (arguing that undue influence already provides some protection against disinheritance, but that the doctrine should be purified so that it protects the dead testator's true intent, rather than disinherited family members).

29. Lara Zdravecky, Research in the Fulton County, Georgia, Probate Court, July, 1998 [hereinafter Fulton County Probate Court Research]. The probate courts of Fulton County Georgia afford litigants the right to a jury trial, upon formal request by the parties. However, before a case may go to trial, Fulton County requires all probate cases, such as will contests, to be submitted to mediation first, unless the attorneys can convince the judge otherwise (which is an extremely rare occasion). If mediation does not work for the parties, they may return to court and proceed with a full evidentiary trial, whether it be by jury or by bench. Fulton County experiences, roughly, a 65% success rate with mediation, and its courts hear only a couple of jury

II. RESEARCH RESULTS IN MASSACHUSETTS AND GEORGIA

A. *Judges versus Juries as Decision Makers in Will Contests*

This article presents research conducted in several probate systems nationwide. At the outset, it must be recognized that such research is often next to impossible in antiquated, uncomputerized probate systems such as those in Massachusetts and New York.³⁰ The data we gathered in Suffolk County, Massachusetts was in fact gathered for one of my assistants by a court employee, Genevieve Donnelly, who happened to be keeping a list on intake of those matters which were contested. We were not so lucky in other Massachusetts counties or in New York. In contrast, data collection was relatively easy in Fulton County (Atlanta) Georgia, whose system we view as the prototype for our recommendations.

In Suffolk County, as in the rest of Massachusetts, no jury trial can be had for will contests.³¹ In this environment, all such cases from 1995 to 1997 that were decided by judges were resolved in favor of the will proponents.³² Research in Davidson County, Tennessee, where jury trials may be used as an alternative to judicial decision making, revealed that ten of twelve will contests before a judge were resolved in favor of

trials per year. The sample gathered in the summer of 1998 by Lara Zdravecky, a research assistant on location in Fulton County, Georgia, for the years 1995 to 1997, revealed four requests for a jury trial. Of the four requests, two of the cases were settled during mediation, while the remaining two cases were determined by jury trial. The Senior Attorney for Fulton County Probate Court expressed the department's enthusiasm and pride in the success of their mediation program. Of course, trial by jury, or before the bench, is always available in the event that the mediation program is deemed unsatisfactory by the parties involved in the dispute.

30. Telephone Interview with Saul Gerstenfeld, Clerk of Courts, King's County Probate Court, Brooklyn, N.Y. (July 8, 1998) (characterization of New York's surrogate courts is that of Mr. Gerstenfeld. The Massachusetts characterization is that of the author).

31. See *supra* text accompanying note 21.

32. Research by research assistant Tracey Bulger pursuant to an interview with Genevieve Donnelly by Tracey Bulger, Suffolk County Probate Court, in Boston Massachusetts (March, 1998) [hereinafter Suffolk County Probate Court Research]. Ms. Bulger took a sample of will contests in Suffolk County, Boston, Massachusetts from the years 1995 through 1997. A total of 38 cases were gathered and analyzed. Nine cases were presided over by a judge and all 9 of the 38 cases were decided for the proponent. Nineteen of the cases were settled outside of court. The remaining cases from the sample included four cases that ended in compromise verdicts rendered by the judge, two that were dismissed for procedural reasons, and four cases that were withdrawn before a decision or settlement could be reached. From this sample it could be concluded that a will contestant is not likely to win in Suffolk County Probate Court if he or she fails to reach a settlement and tries the case before a judge.

the proponent, but just seven of twelve before a jury were resolved in favor of the proponent.³³

The wills contested in Davidson County ordinarily did not involve huge fortunes—the average value of the contested estate was \$95,906.00. The median value was \$54,867.53. There was no correlation between size of the estate and the likelihood of contest. In all, there were sixty-six wills contested during the nine-year period of the study; of these, only twenty-four actually proceeded to judgment or verdict, of which twelve were decided by a judge and twelve by a jury. As previously indicated, five of twelve jury verdicts were for the contestant, as were two of the twelve judgments of the court. Thus, while juries showed only a slight bias in favor of proponents, judges held decidedly in their favor. These results suggest that while it is more likely that the judge will find for the proponent, the converse—that a jury will automatically find for the contestant—is not true. One view of these results is that the potential in Davidson County of choosing a jury rather than a judge may give

33. See Schoenblum, *supra* note 9, at 626-27. The predominant contestants in this nine-year study were children, siblings, nieces and nephews, grandchildren and "lawful heirs," or "next of kin." *Id.* at 636-40 tbls.15, 16, 17. A substantial number of cases involved efforts by family members to prevent the distribution of property to outsiders in addition to traditional intra-family disputes. *Id.* at 632-34. However, there was not a single case during the nine-year period of study in which a child of the testator mounted a truly successful contest against siblings. *Id.* at 641 n.88.

Another study concluded that approximately 75% of all will contests heard by a California jury were successful. Note, *Will Contests on Trial*, 6 STAN. L. REV. 91, 92 (1953). The Note reported that "[o]f the 220 cases examined, 116 reached the jury, resulting in 99(77%) verdicts for the contestant." *Id.* at 92 n.5. However, this figure is unsupported by the findings of Jeffrey Schoenblum. See Schoenblum, *supra* note 9. He analyzed the results of will contests in Nashville, Tennessee, over a nine-year period. *Id.* at 608-11. Schoenblum determined that in Davidson County for

1984, there were a total of 4,270 deaths. Yet, the number of wills filed for probate with the Clerk of the Probate Court was only 971 . . . this represents only 22.4 % of total deaths in the county . . . [t]hese results suggest that the probate process has played no role in the transmission of the wealth by the majority of decedents in Davidson County.

Id. at 611.

Schoenblum noted that in no year during the nine-year period did the number of contests exceed 1.244% of all probates. This figure is set against the already low number of wills that were entered into probate. *Id.* at 612. The author suggests five reasons why the figure is so low, including: (1) minors/incompetents are not capable of making wills; (2) not all wills are submitted for probate; (3) decedents who die late in one year may not have had their will offered for probate until the following year (although any loss at the end of one year should have been made up, at least in part at the beginning of the next year, but the figure remains the same on average per year); (4) the use of will substitutes, such as joint tenancies and revocable trusts; and (5) persons die without estates consisting of sufficient assets to require probate. The two main reasons for the low number of contests are few disgruntled parties and the high attendant cost to litigate. See *id.* at 616.

the contestant at least some chance to win before a judge,³⁴ whereas, in Suffolk County, Massachusetts, there appears to be virtually no such chance.³⁵ In addition, the Davidson County contestants had close to a fifty percent chance of winning when the jury trial option was chosen. Thus, the results indicate that the contestants' overall chances of a favorable decision are much greater in Davidson County, Tennessee, than in Suffolk County, Massachusetts.

In examining these limited findings for purposes of this article, a nationwide study was conducted of will contests based on undue influence or lack of testamentary capacity whose appeals were reported from February 3, 1997 to January 27, 1998. It revealed that only eight of the wills contested during this period had been decided by juries at the trial court level.³⁶ All eight of the judgments in the lower court were affirmed by the appellate court. Five judgments were for contestants and two were for proponents. The eighth appeal was from a judge's decision overturning a jury verdict for the contestant. This judgment was affirmed for the proponent.³⁷

A markedly different pattern emerged from judge-trying cases. Of the twenty-two cases involving undue influence and lack of testamentary capacity, only five were originally decided for the contestant. Of these, two were reversed for the proponent and three were affirmed. Perhaps the most striking finding, however, was that seven cases originally decided by a judge in favor of the proponent were reversed by the appellate court.³⁸

Ultimately, contestants won in ten of twenty-two cases (although the outcomes of the seven reversals once they were retried are unclear); only

34. See *id.*

35. See *supra* note 32 and accompanying text.

36. The study, by research assistant Kathryn Colson, [hereinafter Appellate Court Research] found that of 22 bench trials which went to the appellate level, 12 cases were ultimately decided for the proponent and the remaining 10 in favor of the contestant. Of the 12 for the proponent, ten were affirmed decisions (from trials in New York (2), South Carolina, Virginia, Oklahoma (2), North Dakota, Kansas, and Georgia (2)); only two were reversals of the lower court's decision for the contestant (New York and Florida). Of the 10 appeals which were decided in favor of the contestant, only three decisions were affirmed (from New Hampshire, Louisiana, and New York) and the other seven appeals were reversals of a lower court ruling for proponent (from Alabama, Texas, Massachusetts, Florida, Kentucky, Illinois, and Arizona). The study also revealed that, of seven jury trials that had gone to the appellate courts concerning the issues of undue influence and lack of testamentary capacity, two of the appeals were decided in favor of the proponent, (one was an affirmed decision, and the other was a reversal). The remaining five cases were decided in favor of the contestant, (three affirmed the decisions of the lower court and two reversed the lower rulings for the proponents).

37. See *id.*

38. See *id.*

three of these ten judgments were originally made by the probate judge and then affirmed.³⁹

In summary, when before a judge at the trial level, the contestant prevailed only five of twenty-two times; if the contestant went before a jury, the contestant prevailed six of eight times (although one of these verdicts was overturned by a judge as unsustainable at law).⁴⁰

One might even conclude that the observed bias of probate judges against contestants is so remarkable that the appellate courts have in many cases decided to step in and overturn the decisions of probate judges: of the seventeen cases originally decided by the judge for the proponent, seven were overturned at the appellate level.⁴¹

In litigated cases, the stunning bias of judges, as opposed to jurors, in favor of proponents tends to mask the fact that contestants appearing before judges often "win" settlements. For example, the Suffolk County research did indicate that a number of contests before a judge were settled by the parties, and that the contestants received substantial portions of the estates involved.⁴²

One question that arises is why proponents in Suffolk County are settling with contestants when they will almost surely win if they were to litigate before judges. There are a number of possible answers. First, proponents may not know that they will almost surely win before judges; second, they may want to settle anyway in the interest of family harmony or to avoid the expense and delay of trial. Finally, it is possible that the cases settling are generally the *strong* contestants' cases: that is, if these cases went to trial, many of them might be decided in the contestants' favor, even by a judge.

B. *The Use of Alternative Dispute Resolution in Will Contests*

If a significant number of contests are being settled, even under a Massachusetts system that does not provide for jury trials, why should we worry about instituting ADR? In a recent unpublished paper, one scholar who takes a neutral position as to ADR suggests the following reason: settlement may not equal reconciliation or true resolution of the conflict.⁴³ In this view, party-driven settlement (often negotiated by law-

39. See *id.*

40. See *id.*

41. See Appellate Court Research, *supra* note 36.

42. See Suffolk County Probate Court Research, *supra* note 32.

43. See generally Lea Hunsicker Macchi, *The Morality of ADR: Does It Exist?* (1997) (unpublished manuscript, on file with the author).

yers) may satisfy the court but, because it is arrived at without the assistance of a neutral party to level the playing field, it may also reflect underlying power disparities between the parties and may not truly reconcile the members of the families that are involved in the will contest.⁴⁴

Even if we lack hard evidence that more equitable resolutions are generally reached through mediation than through traditional two-party bargaining generally, mediation remains less expensive and easier to implement than are the alternatives. When mediation is used, resolution of a dispute can often be reached in a single session. The Fulton County Probate Court in Atlanta believes so strongly in the superiority of settlements under ADR that it refers virtually all will contests immediately to mediation.⁴⁵ Against a backdrop where either judicial or jury decision making is available when mediation fails, Fulton County reports a sixty-five percent success rate in mediating settlements of all contested matters.⁴⁶

In my view, the necessary climate for mediation settlements is achieved in a system that affords the contestant the right to a jury trial.⁴⁷ If parties know that in jurisdictions with no jury trial contestants are unlikely to win a litigated contest, the relative strength of their bargaining positions will be affected. An experienced estate litigator in New York City shared what he thought were even more important reasons: cost and

44. See *id.*

45. See Fulton County Probate Court Research, *supra* note 29. The Fulton County Probate Court initially refers all of its cases to mediation, unless the attorneys can convince the judge otherwise. Rarely do the attorneys try and, if they do, even more rarely do they succeed in convincing the judge that the case should go directly to trial. The parties are not required to reach a decision or agreement in mediation. A trial is always available if mediation fails.

46. Interview by Lara Zdravecky with Barbara Koll, Senior Attorney of Fulton County Probate Court, in Atlanta, Ga. (July 1, 1998) [hereinafter Koll Interview]. Zdravecky took a sample of 36 cases involving will contests filed in the Fulton County Probate Court between 1995 and 1997. In each case, issues of undue influence and lack of testamentary capacity were present. Of the total 36 cases involving undue influence and lack of testamentary capacity, 24 were settled in mediation, producing a 67% success rate for mediation of these types of disputes. The remaining 12 cases went to trial after mediation proved to be unsuccessful. Ten of these cases were decided by a judge (eight for the proponent; one for the contestant; and one, which was a modification of the will, a compromise) and the last two cases were decided by a jury (both cases were decided for the contestant). The 65% success rate, referred to by Barbara Koll, was the product of all of the matters that came before the probate court in the same time period. See Fulton County Probate Court Research, *supra* note 29. In addition to the cases of undue influence and lack of testamentary capacity, which Lara Zdravecky researched, Barbara Koll's statistics included matters such as fraud, faulty execution, guardianships, and spousal annual support. See *id.*

47. See Koll Interview, *supra* note 46. Of the 12 Fulton County cases that mediation failed to settle, the two cases presented to a jury were decided in the contestants' favor. In contrast, eight of the ten cases presented before a judge were decided for the proponents.

delay. He argued that settlements become increasingly easier to reach as the costs of alternatives escalate. Although a trial before a judge is costly, involves delay, and can provide incentives for both sides to settle, a trial by jury is even more expensive and time consuming. This attorney sees the right to a jury trial in New York as important in fostering settlements, even if these settlements are reached for the "wrong" reasons.⁴⁸

When questioned, the attorney made clear he would much prefer the Atlanta system of virtually automatic mediation to the New York system. Again, the main reason aside from better settlements was the avoidance of high cost and delay. The New York Attorney believed that the Atlanta system would provide less expensive, quicker, and better results than does the New York system.⁴⁹ I agree and, therefore, view the Fulton County system as the prototype for American probate courts handling will contests.

III. TRIAL BY JURY IN WILL CONTESTS: CONTRASTS WITH JUDICIAL DECISION MAKING NATIONWIDE

Shortly after California repealed the right to jury trial in will contests,⁵⁰ Massachusetts followed suit.⁵¹ In California, the primary reasons for the change seemed to involve judicial economy. The California Law Review Commission complained that too many jury verdicts were being decided for contestants and that many of these decisions were later being reversed on appeal.⁵² Because at early common law will contests involving realty were tried by jury but those involving personalty were not, history provided no clear guide as to what modern probate systems, which try both types of cases, should do.⁵³ Furthermore, state constitutions in general provided no such right to a jury.⁵⁴ Therefore a system that reduced costs and delay seemed to make sense.

A study of which states permit jury trials in will contests was under-

48. See Dorfman Interview, *supra* note 22.

49. *Id.*

50. CAL. PROB. CODE § 7200 (West 1991).

51. See *supra* note 21.

52. See *Recommendation Relating to Opening Estate Administration*, 19 CAL. L. REVISION COMMISSION REP. 787, 793 (1988); See also DUKEMINIER & JOHNSON, *supra* note 3, at 157-58.

53. Josef Athanas, Comment, *The Pros and Cons of Jury Trials in Will Contests*, 1990 U. CHI. LEGAL F. 529, 532 (1990).

54. See *id.* Will contests are tried in state courts, and the Seventh Amendment to the United States Constitution, which guaranteed the right to a jury trial in certain civil cases, has not been extended to the states by the Fourteenth Amendment's due process clause. See *id.*

taken by a student commentator, Josef Athanas, in 1990.⁵⁵ According to Athanas, seven states specifically deny jury trials in will contests.⁵⁶ Massachusetts must be added to this list.⁵⁷ The majority of states have statutes controlling whether there is a right to a jury trial in will contests.⁵⁸ These statutes range from provisions granting a waivable right to jury trials to those denying jury trials altogether.⁵⁹ Although most states have decided that there is no constitutional right to a jury trial in will contests, two states—Indiana and North Carolina—have found such a right at common law.⁶⁰ Nine other states take the opposite approach, finding that common law does not dictate a right to a jury trial in will contest proceedings.⁶¹ However, in three of these states—Delaware, Ohio, and Wisconsin—it is within the discretion of the judge hearing the will contest to convene a jury. Therefore, despite their common law traditions of denying an absolute right to a trial by jury, it is evident that these three states are reluctant to abandon completely the use of juries in will contests.⁶²

55. See generally *id.* Although it is possible that states have changed their position on jury trials in will contests since Athanas' compilation, I believe the study is recent enough that any changes would be minor, if they exist at all.

56. See *id.* at 540. According to Athanas, the following states do not permit trial by jury in will contests: Arkansas; California; Louisiana; Oregon; South Dakota; Maine; and Kansas.

57. See *supra* note 21.

58. See *id.*

59. See Athanas, *supra* note 53, at 538. Fifteen states have statutes under which the right to a jury trial must be asserted in the first pleading; otherwise the right is waived. See *id.* (Alabama, Georgia, Illinois, Iowa, Michigan, Mississippi, Maryland, Missouri, Nebraska, Tennessee, Texas, Virginia, West Virginia, Wyoming, and North Dakota). Two states, Montana and Nevada, have statutes granting a jury trial in a will contest when one of the parties requests it. In these states, however, the jury is required to return a special verdict. See *id.* In Alaska, Arizona, Kentucky, Minnesota, Oklahoma, and Pennsylvania, the permissibility of a jury trial in a will contest is within the judge's discretion. See *id.* In these states, a court may use its discretion to convene an advisory jury for the determination of any issue of fact in cases where there is no constitutional right to a jury trial. See *id.* In Kentucky, the court, on its own initiative, may try an issue with an advisory jury. See *id.* Judges, in Oklahoma and Pennsylvania, may impanel an advisory jury. *Id.* Colorado, Hawaii, New Mexico, New York, South Carolina, and Utah enacted statutes which grant the right to a trial by jury in a will contest if the parties demand such a trial. Notwithstanding the parties' waiver of the right to jury trial, the courts in these states are still permitted to empanel an advisory jury. See *id.*

60. See *id.* at 536. On June 18, 1952, the Indiana Supreme Court created a common law right to a jury trial in will contests although a statutory right to a jury trial for will contests no longer existed in that state. North Carolina common law makes a jury trial mandatory for will contests. Jury trials may not be waived because the state considers all will contests in rem proceedings, holding that since the contestant and the devisee are not actually parties to the proceeding, they cannot by consent relieve the judge of his duty to submit the issue to a jury. See *id.*

61. See *id.* at 537. These states are Connecticut, Delaware, Florida, Idaho, Ohio, New Jersey, Rhode Island, Vermont, and Wisconsin. See *id.*

62. See *id.* at 541. According to Athanas, 13 states do not use juries at all when deciding will contests. Thirty-seven states occasionally use some form of jury trials when deciding will con-

Furthermore, although there may not be a fundamental state constitutional right to a jury trial, even courts that do not hear full-blown jury trials may be empowered to convene an advisory jury.⁶³

Athanas suggests that a determination as to whether there should be a right to a jury trial of will contests must rest on some basis other than history.⁶⁴ In addition, he argues against the use of jury trials in probate proceedings.⁶⁵ Athanas is concerned that jury trials result in the surrender of juries to their emotions in rendering verdicts. Essentially, this same argument is relied on by a number of other writers to support the use of the jury trial; however, such writers generally see the use of juries as involving a sense of equity rather than emotion.⁶⁶ Some argue that juries may be acting properly when they decide will contests based on their sense of equity, rather than based on the law, because common sense is likely to lead them to the right result in cases of this nature.⁶⁷ Juries have the ability to focus and reason by looking at the facts, specific circumstances, and issues particular to each case. Hence, the crux of the issue in will contests may be whether it is better to have a jury trial than a bench trial because the jury might be more concerned with equity than with law and, therefore, render more judgments that are favorable to the contestant.

The disparity between judge and jury verdicts in will contests has much to do with the reality of the probate courts themselves. Probate judges, on the whole, have a vested interest in moving cases along; they want probate administrations to go smoothly and without unnecessary

tests. There are four basic approaches to the use of jury trials in will contests: "(1) not using juries at all; (2) using advisory juries; (3) using juries that may render only special verdicts; and (4) granting a right to jury trials." *Id.* (With the addition of Massachusetts to the list of states that do not use juries, the numbers of states cited by Athanas should be revised to 14 and 36, respectively. See *supra* note 21.)

63. See Athanas, *supra* note 53, at 534, 539.

64. See *id.* at 535.

65. See *id.* at 541. The commentator argues against the use of jury trials in will contests for four reasons: (1) jury trials are more time consuming than are bench trials; (2) jury trials are less "legally fair" than are bench trials because juries are more likely to reach a verdict contrary to the law, by applying their own sense of justice; (3) lay juries are limited in their understanding of the issues involved; and (4) juries are vulnerable to the emotions that pervade will contests—they often base verdicts on their impressions of the contestant and the devisee, rather than on the testator's will. See *id.*

66. See *id.* at 550-53. Arguments in support of jury trials in will contests include the following: (1) jury trials are more equitable than bench trials because jurors decide cases using their common sense ideas of justice, rather than rigidly applying the law; and (2) jury trials of will contests add legitimacy to the legal system by fostering community participation in the resolution of legal disputes. *Id.*

67. See *id.* at 550.

delay.⁶⁸ On the whole, neither they nor the bar that appears before them are accustomed to jury trials.⁶⁹ Probate judges are accustomed to exercising broad discretion in probate matters of all kinds. They have a vested interest in protecting a testator's will and probably feel that, if a contest must be had, they will be better at determining whether undue influence or incapacity exists than will a jury. Jury trials involve delay and introduce an "equitable" element that probate judges, even if they feel they can also exercise it, typically reserve for themselves.⁷⁰

In reality, the law of undue influence and lack of testamentary capacity is more concerned with fact than with law. The law is relatively

68. See Rosenfeld, *supra* note 4, at 187-88.

69. Gary D. Zweifel, *Jury Trials Come to Probate Courts of Georgia*, 23 GA. B. J. 96, 96-97 (1986).

70. See generally, Doris Marie Provine, *Persistent Anomaly: The Lay Judge in the American Legal System*, 6 JUST. SYS. J. 28 (1981). In the course of this article on the decreasing importance lay judges play in the American judiciary, Provine makes some interesting observations on the equitable elements that lay judges, like juries, bring to the justice system in contradistinction to the law-mindedness of legally-educated judges.

Provine notes, for example, that "the assumption that lay persons and lawyers think differently in ways relevant to adjudication has been prevalent for generations in literature . . ." *Id.* at 31-32. Furthermore, "the assumption that lay persons and lawyers bring different perspectives to adjudication reserves its fullest institutional expression in the jury . . ." *Id.* at 32.

Provine then quotes jury expert Harry Kalven, Jr.: "The judge and jury are two remarkably different institutions for reaching the same objective—fair, impersonal adjudication of controversies. The judge represents tradition, discipline, professional competence and repeated experience with the matter. . . . But the endless fascination of the jury is to see whether something quite different—the layman amateur drawn from a wide public disciplined only by the trial process, and by an obligation to reach a group verdict—can somehow work as well or perhaps better." *Id.* (quoting Harry Kalven, Jr., *The Jury, the Law and the Personal Injury Damage Award*, 19 OHIO ST. L.J. 158, 178 (1958)).

Provine also looks to Broeder, noting that "while it is generally recognized that juries often return verdicts contrary to law, we cannot be sure whether this results from conscious law-dispensing or pure bungling." *Id.* at 38 (quoting Dale Broeder, *The Functions of the Jury: Facts or Fiction?*, 21 U. CHI. L. REV. 386, 412 (1954)). She observes that Holmes did not mind the mystery of jury verdicts, because their verdicts are in large part a result of "popular prejudice . . . [keeping] the administration of the law in accord with the wishes and feelings of the community." *Id.* Thus, as Provine herself puts it, "[T]he jury provides the necessary antidote to too much law in adjudication." *Id.* Provine's conclusion is relevant to the central theme of this article:

Some academics are intrigued with the possibility of avoiding the disadvantages inherent in the zero-sum game of traditional courtroom conflict managed by lawyers. Enthusiasm from them [and policy-makers concerned with reducing congestion in the courts] has encouraged experimentation in alternative modes of dispute resolution [which] share a commitment to informal, conciliatory modes of decision-making. Often lay persons play a prominent role in such experiments as mediators and arbitrators. The considerable favor with which lay participation is now viewed raises the obvious question of whether past experience contains lessons relevant to the future successes of lay-dominated dispute resolution.

Id. at 40.

easy to state, at least in a general way, and involves no technicalities beyond the comprehension of the average layperson. If this is true, then would not six or twelve laypeople have a better sense of what is fair to the parties than would a single judge? Juries have no vested interest either in the administration of a court calendar or in judicial economy. They come, they serve, they decide what makes sense, and they go. Presumably their decisions impart the sense of the community as to what is a fair distribution of estate assets within the family.

Those who are opposed to jury trials will surely answer that the juries' sense of fairness focuses more on the disposition itself than on protecting a testator's intent as expressed in the will and, therefore, they will concentrate more on fairness to the living than on fairness to the dead. Although it may be true, this tendency is not necessarily offensive. In fact, this orientation may make good sense. Even though a testator's desires are undoubtedly important under our system, it has always been for the community, through laws such as the elective share⁷¹ or through jury verdicts,⁷² to provide checks on this deference to testamentary intent.

It is clearly not in the best interests of judicial economy for probate judges to find wills invalid;⁷³ therefore, the deck is inevitably stacked against will contestants when judges alone make the decisions.⁷⁴ The better alternative for both judges and judicial economy, however, would be a settlement of a will contest by the parties, which obviates altogether the need for a trial.⁷⁵

This argument for jury trials in will contests is not terribly popular at present, given the widespread sentiment for reducing court congestion. After all, as we have seen, the important court systems of California⁷⁶ and Massachusetts⁷⁷ have decided to eliminate juries in probate matters. However, according to Albert Alschuler, this move away from the jury trial has taken place in a system that itself is not working properly:

71. See *Disinheritance*, *supra* note 2, at 2-3. See also *American Children*, *supra* note 2, at 406-07.

72. See Appellate Court Research, *supra* note 36. See also Schoenblum, *supra* note 9, at 626-27.

73. See Rosenfeld, *supra* note 4, at 187-88. See also Schoenblum, *supra* note 8, at 626-27.

74. But see Appellate Court Research, *supra* note 36. In research conducted by Kathryn Colson, evidence was found that the probate judges' attempts at judicial economy may be failing. A study of cases appealed during 1997 through 1998, involving undue influence and lack of testamentary capacity, revealed that many of the judges' decisions for proponents were being overturned on appeal.

75. Telephone Interview by Lara Zdravecky with Barbara Koll, Senior Attorney of Fulton County Probate Court (July 20, 1998).

76. See CAL. PROB. CODE § 7200 (West 1991).

77. See *supra* note 21.

The vanishing jury—might not be a cause for concern if increased settlements reflected a more cooperative attitude on the part of civil litigants. Nevertheless, current settlement rates do not reflect a kinder, gentler, and less litigious America. Instead, the near disappearance of the trial [and jury] is the product of the government's failure to supply a basic social service, the impartial resolution of disputes. We have not witnessed an increase [of] involuntary settlements against a background of adequate judicial services. Rather . . . [settlements occur] because our trial system has become unworkable. The American trial has been bludgeoned by lengthy delays, high attorneys' fees, discovery wars—and the world's most extensive collection of cumbersome procedures.⁷⁸

In other words, although fewer jury trials may reduce the delays and costs of the civil system,⁷⁹ this change may simply compound the government's failure to provide an adequate dispute resolution system, without improving the quality of settlements. At the same time, not only is the trial of will contests by probate court judges less formal, faster, and less expensive than jury trials, but it is faster and less expensive than is most other civil litigation. An experienced practitioner details the pre-1986 situation in the Georgia probate courts as follows:

Most matters in the probate court have typically been handled, even when contested, within two within two to three months. Often a good probate judge could assist families to a resolution of the case through informal consultation with the lawyers and with the families so that everyone felt they had had their "day in court" and typically no one wanted to litigate the matter further. . . . For many years, new lawyers have been told . . . that Georgia has one of the "simplest" and "most efficient" probate court systems in the country. He or she was reminded that lawyers in other states marveled at the informality and speed of the typical administration of estates in Georgia.⁸⁰

The attorney in question was concerned that the right to a jury trial, which was introduced in 1986, would mean that contested estates would take at least a year to try in Georgia's larger counties.⁸¹ Perhaps, in part, the informal old system was just a bit too "cozy" for the legislature to tolerate. Clearly, other states' probate trials were generally lengthier and more formal than were those in pre-1986 Georgia.⁸² One suspects that such trials were lengthy and costly enough to induce settlements in will contests that otherwise may have gone to trial.⁸³

The notable battle waged in the New York County Surrogate's

78. Albert W. Alschuler, *The Vanishing Civil Jury*, 1990 U. CHI. LEGAL F. 1, 5-6 (1990). See also text accompanying *supra* notes 22 and 48.

79. See Appellate Court Research, *supra* note 36.

80. See Zweifel, *supra* note 69, at 98.

81. *Id.* at 98.

82. *Id.* at 96-98.

83. See *supra* note 22 and accompanying text.

Court over the Johnson & Johnson fortune resulted in an extremely costly settlement, which reached just before the jury was given the case.⁸⁴ Although high costs might have forced settlements in other cases earlier in the process, there was so much money involved in this case that the dominant reason for settlement here seems to have been proponents' fear of a jury verdict. As recounted by Professor John Langbein, a "meritless"⁸⁵ claim of undue influence was brought by the Johnson children against a will that left most of the elder Johnson's assets under the control of his relatively young second wife. Langbein seems at first to blame what he considered an unjust settlement in favor of the children on the fact that the children had a right to a jury trial. He cites Leon Jaworski's comment that "the average jury is visited with a strong temptation to rewrite [the will] in accordance with the jury's idea of what is fair and right."⁸⁶ This tendency, according to Langbein "place[s] testamentary freedom at risk" and causes the proponents to settle.⁸⁷

With this said, Langbein proceeds to undermine his own distaste for the civil jury in will contests by attacking (after Margolick)⁸⁸ the behavior of the judge, Surrogate Marie Lambert. After lambasting Judge Lambert for her favoritism toward the Johnson children (in both her conduct of the trial and instructions she was prepared to give to the jury), Langbein notes that "Americans can only look with envy to the esteemed and meritocratic chancery bench that conducts probate jurisdiction in English and Commonwealth jurisdictions."⁸⁹

One is left with several questions concerning the apparent contradictions in Langbein's argument. Would Langbein, like the above-quoted Georgia attorney, prefer to leave matters in the hands of probate judges like Marie Lambert without the check of the civil jury? Given that Americans are unlikely to change their largely political methods of selecting probate judges and choose a bench like that in England and the Commonwealth, are we not better off with a jury system in probate contests? Although jury trials would be longer and more expensive than would those decided by judges, is not the necessary corollary to Lang-

84. See DUKEMINIER & JOHANSON, *supra* note 3, at 181-93. See also DAVID MARGOLICK, *UNDUE INFLUENCE: THE EPIC BATTLE FOR THE JOHNSON & JOHNSON FORTUNE*, Part 3, *The Trial*, at 399-599 (1993).

85. John H. Langbein, *Will Contests*, 103 YALE L.J. 2039, 2043 (1994) (book review).

86. See *id.* at 2043, n.10, quoting Leon Jaworski, *The Will Contest*, 10 BAYLOR L. REV. 87, 88 (1958).

87. Langbein, *supra* note 85, at 2043.

88. See *id.* at 2044; See, e.g., MARGOLICK, *supra* note 84, at 313, 407, 424, 459, 479, 486, 494, 523-24, 546-47, 550, 564, 576, 585.

89. Langbein, *supra* note 85, at 2044.

bein's complaints about probate judges that higher quality decision making may occur with the use of juries?

To be certain, settlements of will contests do occur given the anticipated delays and costs associated with trials, particularly jury trials. Because most probate systems take longer to try will contests than was apparently the case in pre-1986 Georgia,⁹⁰ bad settlements may result from the lack of the necessary resources to try such cases more quickly.⁹¹ Settlement for the wrong reasons may produce neither just results nor true family reconciliations. What then is the alternative? Does the jury trial improve the situation or make it worse?

As a prominent judge recently wrote, "I am convinced that collectively the jury is better able to decide the case in a manner consistent with community standards and values than is the judge."⁹² Professor George Priest supports this position by approving the work of the University of Chicago Jury Project led by Harry Kalven, Jr., and Hans Zeisel, noting "the authors claimed that the civil jury was a superior institution for adjudicating disputes involving complex societal values, that the jury serves as an important instrument of popular control over law enforcement, and that the jury brought a superior sense of social equity to the decision-making process."⁹³ However, the jury trial takes longer⁹⁴ and is more expensive than is the judge-decided trial, so does not this fact potentially lead to even "worse" settlements (i.e., coerced) than would trials by judge?

This quandary was resolved in an interesting way in Fulton County, Georgia. Two years after the introduction of probate jury trials in 1986, the court developed a process of referring virtually all contested matters to mediation. Whether this resulted from pressure from a probate bar inexperienced in conducting full-fledged jury trials⁹⁵ or from a sense that the strength of the informal system could best be continued by using a mediator rather than judge—or both,—the new system has been successful in settling sixty-seven percent of contested matters brought on undue influence and capacity grounds.⁹⁶ Although the pressures induced

90. See generally Zweifel, *supra* note 69.

91. See generally Alschuler, *supra* note 78.

92. Prentice H. Marshall, *A View from the Bench: Practical Perspectives on Juries*, 1990 U. CHI. LEGAL F. 147, 158 (1990).

93. George L. Priest, *The Role of the Civil Jury in a System of Private Litigation*, 1990 U. CHI. LEGAL F. 161, 162 (1990). See also HARRY KALVEN, JR., & HANS ZEISEL, *THE AMERICAN JURY* (Little, Brown, & Co. 1966); Harry Kalven, Jr., *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055 (1964).

94. See Priest, *supra* note 93, at 193.

95. See Zweifel, *supra* note 69, at 97.

96. Research conducted by Lara Zdravecky in July 1998 revealed that the Fulton County

by longer, more formal, and more expensive jury trials may have produced this settlement rate, it is probable that the quality of such settlements has been improved by taking them away from probate judges with their vested interests in upholding wills and giving them to impartial mediators with no such interests and without ultimate decision-making power.

IV. ROUTINE MEDIATION WITH JURY TRIALS AS AN ALTERNATIVE

The right to a jury trial is best used in a system that attempts ADR first. Will contestants in Atlanta's system have a right to a jury trial as an alternative if mediation fails.⁹⁷ The judge in Fulton County seldom rules

Probate Court decided 36 cases involving will contests between 1995 and 1997. In the majority of these cases, wills were contested on grounds of undue influence and lack of testamentary capacity. In some instances, undue influence and lack of testamentary capacity were coupled with allegations of fraud, faulty execution, and various other grounds for the contest of a will. Of the 36 cases examined, 24 were settled in mediation. The bases for the will contests in each of the settled cases are as follows: one for undue influence solely; one for undue influence coupled with fraud; one for undue influence and fraud with a claim of a child being omitted from the will in question; one for undue influence with the claim of an incomplete petition; 13 for undue influence and lack of testamentary capacity; two for undue influence and lack of testamentary capacity with fraud; three solely for lack of testamentary capacity; and two for lack of testamentary capacity and fraud. See also Fulton County Probate Court Research, *supra* notes 29 and 45.

97. Telephone Interview by Lara Zdravecky with Barbara Koll, Senior Attorney of Fulton County Probate Court (July 20, 1998). See also Fulton County Probate Court Research, *supra* note 29. In the Fulton County Probate Court, the parties are first required to make a court appearance. At this appearance, the judge may order the parties to dispose of the case through mediation. If there is an objection to the judge's order, counsel must convince the judge that attempted settlement of the case through mediation would be inappropriate. Although they are required to make an appearance and an attempt at mediation, the parties are not obligated to reach a settlement. The option of a trial, by either bench or jury, is always available to the parties. Fulton County is one of the few counties in Georgia which permits parties to request jury trials in probate matters. (Counties such as neighboring Forsyth County do not allow a jury trial in probate matters, unless the case in question is tried *de novo* in the superior court.) If an agreement is reached during mediation, the parties are required to present the agreement to the probate judge for approval. Once the settlement agreement is approved, the parties proceed in accordance with the provisions specified in the mediation agreement.

If no agreement is reached during mediation, the parties are permitted to either request a jury trial or continue with a bench trial. Once the case goes to trial, the parties proceed just as they would in a full evidentiary trial. The contestant has the burden of proof. The trial begins with opening arguments, the presentation of evidence in the form of direct examination and cross examination of the witnesses, closing arguments, and then briefs from the attorneys on certain points of law.

from the bench. Upon receiving a judgment, the parties must abide by the court's order or appeal. A trial by jury follows a very similar pattern, with the addition of jury selection and deliberations by the jury after instruction from the judge on matters of law. Proponents of a will may be concerned that the jury, because of its sense of social equity, may be more willing to decide against them than would a judge and that a jury's decision will be more costly in time and money than would that of a judge. As a result, proponents may be more likely to settle. This system places the will contestants on a more even footing than does a system without the jury trial; however, the disincentives of cost and delay will remain to induce them to settle. Even if settlement fails, the typical civil jury may still be a more "just" decider of will contests than is the typical probate judge sitting alone.

Although judges certainly bring discretion and equitable decision making to bear when adjudicating will contests, they are still more conscious of preserving the *law* of the matter than are juries: juries may focus more on fair (natural) distribution of the estate than on the preservation of a dead person's (theoretical) intent. In addition, juries will not impose a stringent notion of what influence might be undue or what degree of mental weakness may rise to the level of incapacity. Instead, they may reason backward. Jurors may collectively feel that if a testator left property in an unnatural manner, he or she must have been crazy, or under undue influence, or both. Even if this is the way many such verdicts are reached, the results are sound because good decision making in these cases should be, to paraphrase Holmes, more the product of experience than of logic.⁹⁸

Furthermore, the law is relatively unimportant in cases of undue influence and incapacity. These matters are fact specific. Thus, if juries decide them on a case-by-case basis, applying their common sense of right and wrong, we are not "losing much" legally. Like mediated cases, little "law" follows from such decisions; they are of little or no precedential value if tried. If jury verdicts result in flexible concepts of incapacity and undue influence, so what? Is not "law" in the sense of rules derived from precedents far more important in areas such as securities regulations and commercial contracts than it is in will contests?

Like the jury trial, mediation focuses more on the proper distribution of the estate than on abstract (and vague) legal principles. The family in mediation, like the community in a jury trial, imposes its ideas of naturalness and fairness, using such factors as relative degrees of kinship of the

98. See OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (Neill H. Alford, Jr. L.L.B., S.S.D., et al. eds., The Legal Classics Library 1982).

contending parties, notions of parental obligation, and the actual personal closeness of potential legatees to the testator.

One difference, however, is that the jury *decides* the matter. A mediator simply attempts to get the parties to a position where *they* can decide what is just. Parties in mediation are invested in and must live with the decision, unlike the civil jury, which can impose judgment and then walk away. For this reason, mediation is preferable to the jury. However, the potential to contest a will before a jury that will decide for the parties presents a viable second choice if mediation fails.

If routine or mandatory mediation is the keystone to an improved system for will contests, how does it work in practice? In the next section, I shall address this issue by first discussing the mediation form of ADR in general and then focus upon how it works in practice, primarily in Fulton County Georgia, and secondly in Hawaii and Oregon.

V. MEDIATION AS A MEANS OF RESOLVING CONFLICT IN WILL CONTESTS

A. *In General*

ADR is employed in lieu of litigation in a myriad of legal situations. In part, it is a response to the frustration individuals feel when involved in the traditional hostile route of litigation, where the process is lengthy, the financial and emotional costs are enormous, and decisions rendered do not entirely reflect each participant's view of fairness.

Traditionally, ADR encompasses many models of dispute resolution including mediation, negotiation, arbitration, and conciliation. The various forms of ADR are quite distinct. For example, in arbitration, the neutral arbitrator submits a decision that is binding on the parties. In mediation, the parties must actively participate to reach a solution themselves. Although each type of ADR is unique, all seek to reach a result through a process that each party perceives as equitable.

B. *The Procedure for a Typical Mediation Session*

Mediation is a form of ADR that presents a valuable alternative to litigation in will contests and is an excellent mechanism for resolving

conflict between feuding parties.⁹⁹ The typical mediation session consists of three main stages: the opening stage; the private caucuses; and moderated negotiations.¹⁰⁰ The opening stage is the first formal stage of the session and sometimes is referred to as the joint session.¹⁰¹ This is the stage at which preliminary matters are addressed, such as who will attend the sessions, how the parties should prepare, and whether counsel will continue to attend with the parties.¹⁰² In cases involving family matters, such as a will contest, parties may not attend with counsel.¹⁰³ Once the parties are all together, the mediator explains the process and rules. The opening stage is an opportunity for the parties to gain confidence in and build rapport with the mediator.¹⁰⁴ If the parties' attorneys are present, they argue the merits of their case directly to the other side; meanwhile, the parties have an opportunity to vent their emotions, frustrations, and anxieties in front of the each other.¹⁰⁵ The opening stage is also very important for the mediator because it allows him or her to gain insight as to what issues are blocking an agreement.¹⁰⁶

Once the opening stage is completed and all of the preliminary matters have been addressed, the parties can separate into private caucuses with the mediator. The mediator talks confidentially with each party and counsel (if present) to try to move toward an agreement.¹⁰⁷

99. See MASS. GEN. LAWS ch. 211B § 19 (1992) (this statute enables civil actions, including probate and family disputes, to be referred to non-binding mediation by the trial court where the dispute originated under the rules established by the chief administrative judge).

100. See DWIGHT GOLANN, *MEDIATING LEGAL DISPUTES, EFFECTIVE STRATEGIES FOR LAWYERS AND MEDIATORS* 61 (1996).

101. See *id.* at 62.

102. See JAMES E. GRUMBACH ET AL., *ANATOMY OF A MEDIATION, MOCK MEDIATION VIGNETTES, PLUS ANALYSIS, PRACTICE, TIPS, AND DISCUSSIONS* 77 (1997).

103. See *id.* at 78.

104. See GOLANN, *supra* note 100, at 62.

105. See *id.* at 63.

106. See *id.* In its opening stage, the goals of mediation are as follows: (1) to introduce the mediator to the parties and counsel; (2) to explain the procedure to the participants; (3) to expose both sides to the merits of the dispute; (4) to provide an arena for the participants to vent their emotions and frustration; (5) to provide an avenue for the transfer of control from the attorneys to the parties themselves; and (6) to gather as much information as possible from what is spoken by the parties and counsel. Mediators use certain tactics to aid in the pursuit of such goals. They need to encourage informality to keep control, and they encourage the parties to face one another throughout the joint sessions to accentuate this informality. See *id.* at 62-66.

107. See *id.* at 68. The goals in the second round, or private caucuses, shifts to some extent from those in the opening stage. The mediator now needs to gather sensitive information that may not come out in joint sessions. If necessary to reach an agreement, the mediator may facilitate the venting of emotions if that has not already occurred. It is in this second round that the mediator must probe for the obstacle that may be blocking settlement. Once identified, the mediator must determine the manner in which the obstacle is to be addressed with both sides; this is necessary if the parties are to move forward with the dispute resolution. Each party's

These private caucuses create an atmosphere in which the parties can share sensitive information, which they may be uncomfortable raising before one another.¹⁰⁸ This stage is another step in the process of building trust between the party and the mediator; it allows each party to talk directly to the mediator in a more comfortable environment.¹⁰⁹ Mediators usually have to move back and forth between the sides at this juncture, employing what is often called shuttle diplomacy.¹¹⁰ However, in family situations such as the will contest, mediators usually employ this method as little as possible, striving to keep the parties in joint sessions as much as possible.¹¹¹

Sometimes an agreement can be reached during the private caucuses, in which case, the last step would be to have counsel approve the agreement.¹¹² If an agreement is not reached after this second stage, then the parties move into the moderated negotiations stage.¹¹³ In this stage, the parties are brought back together, after the caucuses, to work out an agreement in a joint session. The mediator is present to facilitate, not to impose any type of agreement on the parties.¹¹⁴ The mediator may offer possible solutions but the agreement must be that of the parties.

Once an agreement has been reached, the mediation process is over and the parties can move on to carrying out the agreement. The length and number of mediation sessions depend on the parties and the conflict involved.

In summary, mediation is a voluntary, systematic process of dispute resolution in which a neutral third party facilitates communication so that the participants can resolve their conflict in a manner that they believe is just. This form of dispute resolution helps to encourage the family harmony that traditional litigation so often destroys. Because will contests are often highly polemical and involve sensitive emotional issues

position and priorities must be established in order to make an attempt at a settlement more realistic. Before the mediator can proceed with such goals, she must build a trust with the participants. *See id.* at 68-71.

108. *See id.* at 69.

109. *See GOLANN, supra* note 100, at 69.

110. *See id.* at 68.

111. *See id.*

112. *See GRUMBACH, supra* note 102, at 78.

113. *See GOLANN, supra* note 100, at 81-84. The mediator's goal at this point is to push for closure and have the parties commit the deal to writing. The mediator still is serving as a referee and not forcing an agreement. Usually, the parties just need to work out a few minor complications at this point. The mediator wants to encourage constructive negotiations and lead the parties down the path which is going to result in a settlement and not allow them to veer from the ultimate goal of the session. *See id.*

114. *See id.*

that are unlikely to be diffused through litigation, mediation programs may be more critical in this area than in other areas of law. "For many families, inheritance is not merely a matter of intergenerational transfer of wealth. It is also a matter of conflict."¹¹⁵

Professor Susan Gary confirms that litigation is not always the most appropriate means of resolving will contests. She suggests that, because probate disputes are inherently volatile and emotionally charged, mediation provides a milieu in which feuding parties can verbalize their concerns in a less openly hostile fashion.¹¹⁶

Gary argues that probate disputes often encompass concerns that are unique and, therefore, call for a forum for resolution that is unique. For example, disputing parties often have disparate views of fairness. One sibling may believe that the decedent's estate should be divided equally among siblings. Conversely, another sibling may believe that because he took care of the decedent prior to death, a "fair" solution would include his receiving a bigger chunk of the decedent's pie. Gary observes:

[A]t some level, pure greed may generate conflict However, beyond the simple desire for economic benefit, survivors may not want or feel entitled to a 'fair' and equitable distribution, regardless of the amount involved. This desire for fairness breeds conflict if family members have different views of what a fair distribution of the decedent's property should be.¹¹⁷

Other sources of conflict between family members embroiled in probate disputes include the following situations: (1) those in which, because of the types of property involved, "estates are not easily divisible into equal shares;"¹¹⁸ (2) those in which a beneficiary may not receive what he or she believes reflects his or her status within the family;¹¹⁹ and (3) those in which lack of communication rather than the actions taken, may be at the center of the conflict.¹²⁰

Of the numerous advantages of mediating will contests, Gary stresses mediation's ability to "repair, maintain, or improve ongoing relationships[.] [This facet] is of particular importance in resolving family disputes."¹²¹ The emotionally-charged atmosphere following the death of

115. Sandra L. Titus et al., *Family Conflict over Inheritance of Property*, 28 FAM. COORDINATOR 337, 337 (1979), quoted in Susan N. Gary, *Mediation and the Elderly: Using Mediation to Resolve Probate Disputes Over Guardianship and Inheritance*, 32 WAKE FOREST L. REV. 397, 415 (1997).

116. See Gary, *supra* note 115, at 415.

117. *Id.* at 416-17.

118. *Id.* at 417.

119. See *id.* at 421.

120. See *id.* at 422.

121. Gary, *supra* note 115, at 428.

a loved one can exacerbate the existing strife within a family and eventually drive family members apart. Mediation helps to abate the conflict by having the parties work together to reach a solution. This joint investment in the settlement makes its faithful execution more likely than might be the case under other forms of dispute resolution.

In contrast, litigation "encourages parties to become entrenched in their positions and to view a successful outcome as a win for one party and a loss for the other."¹²² This "zero sum game"¹²³ rules out the win-win outcomes possible with mediation. In addition, litigation inhibits communication about anything other than the legal issue at stake.¹²⁴

Scholars are not alone in arguing that mediation is a welcome mechanism for resolving probate disputes. For example, Attorney Dominic Campisi notes that "[m]any probate disputes involve a history of the failure of family members to express anger or resentments toward the deceased or other relatives."¹²⁵ Consequently, he suggests that, to resolve these disputes, "one must understand the grieving process, family dynamics, the need for a forum to express resentment, refusal of family members to accept termination of the family and their preference for continued conflict rather than abandonment, and timing of settlements within these processes."¹²⁶ Mediation, according to Campisi, addresses all of these issues.¹²⁷ Campisi's sentiments in favor of mediation are echoed by David Dorfman, an experienced New York City estate litigator.¹²⁸ Finally, a mediator with the Justice Center of Atlanta writes as follows:

[T]wo factors common to other types of mediation I've done, are common to probate mediation as well. They are that wounded feelings and lack of communication between the parties are more of a barrier to the resolution of the dispute than are the actual money concerns. I have found that simply having the interested parties together in the same room to communicate directly may lower these barriers.¹²⁹

C. Benefits of Mediation

As mentioned, several aspects of mediation make it a unique and

122. *Id.* at 429.

123. See, e.g., LESTER THUROW, *THE ZERO SUM SOCIETY* (1980).

124. See Gary, *supra* note 110, at 429.

125. Dominic J. Campisi, *Using ADR in Property and Probate Disputes*, PROB. & PROP., May/June 1995, at 48, 52.

126. *Id.* at 48.

127. See *id.* at 53.

128. See Dorfman Interview, *supra* note 22.

129. Dan Gulden, *A Sampling of Common Situations in Probate Mediation Cases*, THE CAUCUS (Justice Center of Atlanta, Inc., Atlanta, Ga.), Feb. 1992.

efficacious alternative to litigation. One salient feature of mediation is that it is a purely voluntary proceeding. To engage in mediation, both parties to a dispute must agree that it would be an appropriate method of resolving their issues. In addition, the mediation proceeding is private and confidential. Mediation takes into consideration the fact that most families do not want to "air their dirty laundry" in open court. Consequently, the setting provides the impetus for open communication between family members without fear that everyone will know what is going on in the family.¹³⁰

A recent Supreme Judicial Court Report on ADR in the Massachusetts courts emphasized several noteworthy advantages of mediation.¹³¹ First, mediation empowers the parties involved, because they play an active role in devising a solution for their own dispute. The parties, who likely believe that their voices are marginalized in the judicial process, need not rely on their attorneys to make often futile attempts at diffusing the anger and grief that are ubiquitous in probate disputes. Instead, the individuals involved retain control over the outcome of the case. For this reason, the parties are more likely to be satisfied with the result than are individuals whose solution has been dictated to them.

Second, because many of the individuals involved in probate issues want to maintain ongoing relationships with family members, friends, caregivers, and the like, the process of mediation contains techniques designed to preserve existing relationships by: (1) emphasizing the importance of communication; and (2) teaching people new ways to deal with potential future conflicts.¹³²

The third benefit of mediation is the avoidance of the considerable costs of litigation,¹³³ including attorney's fees and court costs. Delay itself involves financial (as well as emotional) costs; by using mediation, a case can often be resolved much more quickly than it could be using the litigation process. Although a will contest could feasibly drag on for years in the courts, settlement may be reached in a few sessions through the mediation process.

130. See Gary, *supra* note 115, at 424-25.

131. See Report of the Supreme Judicial Court/Trial Court Standing Committee on Dispute Resolution, *Dispute Resolution in the Courts: A Plan to Promote Access, Choice, and Integrity in Court-Connected Dispute Resolution* (June 18, 1996).

132. Gary, *supra* note 115, at 428.

133. See Jonathan W. Reitman, *What Every Successful Bar Applicant Should Know About Alternative Dispute Resolution*, 67 THE BAR EXAMINER 23, 25 (Feb. 1998).

D. Where ADR Is Being Used and Where Should It Be Used

Surprisingly, court-based ADR programs are still in their infancy, particularly in the probate court. Despite their potential for success, surprisingly few formal ADR programs are underway in the probate courts nationwide. Among the most notable of these programs have been those established in the court system of Fulton County, Georgia, and in Hawaii and Oregon.

In 1990, the probate court in Atlanta, Georgia began ordering parties in the majority of disputes to mediation. To date, more than 600 cases from the Fulton County Probate Court have been referred to its mediation program, which boasts a sixty-five percent settlement rate.¹³⁴ Barbara Koll, a senior staff attorney in the probate court, reiterates the benefits of mediation over litigation. She confirms that it is a common misconception that probate court proceedings primarily relate to monetary issues. In fact, Koll asserts that money is secondary to the emotional concerns of the parties involved.¹³⁵ In addressing the advantages of mediation, Koll claims that disputing family members feel better about the negotiated settlements achieved through mediation than they do about court-imposed decisions.

In Hawaii, ADR programs have been adopted at each level of court and have been integrated into the court process through the promulgation of procedural rules.¹³⁶ For instance, circuit court rules mandate that there be a settlement conference in every civil action thirty days before trial. During this conference, the judge can suggest mediation as an alternative to trial.¹³⁷

According to Chief Justice Ronald Moon of the Hawaii Supreme Court, that state's circuit court has considered requiring attorneys to discuss ADR as an option for the parties. If the parties choose not to proceed with mediation, they would then have to sign a statement setting forth why they believe that a trial would be a better alternative.¹³⁸

Chief Justice Moon is a staunch supporter of Hawaii's court-based ADR program. He contends that using mediation in probate matters

134. See Koll Interview, *supra* note 46.

135. See Barbara Koll, *Mediation in the Fulton County Probate Court* 7.3 (Mar. 1, 1995) (unpublished manuscript, on file with author).

136. See Ronald T.Y. Moon, *Visions of a New Legal System: Could There Be a Legal System that Better Incorporates the Strengths of ADR and Existing Legal Institutions?*, 15 REV. LITIG. 475, 476-77 (1996).

137. See *id.* at 477.

138. See *id.* at 479.

effectively addresses the problems encountered in litigation by providing a forum in which families can attend to the emotional aspects of their dispute. To this end, a task force was assembled to develop a court-based ADR program primarily to address probate and trust disputes.¹³⁹

The courts in Hawaii are so serious about ADR that if the court refers a case to mediation either on its own motion or that of one of the parties, participation is mandatory.¹⁴⁰ Similarly, if the parties or the attorneys fail to abide by the mediation rules, the court can impose sanctions.¹⁴¹ Hawaii's model demonstrates that courts can oversee court-based ADR programs and that ADR methods can also be integrated into the litigation process itself.¹⁴²

Although Oregon's courts can also order mandatory mediation, this option is rarely exercised.¹⁴³ Parties are only encouraged to attend mediation proceedings; even this often leads to settlement. Recognizing that some disputes in probate court involve more financial issues but others are noticeably more personal in nature, two panels of mediators have been established in Oregon counties. One panel contains mediators who are well versed in financial matters. The other panel contains mediators who are better equipped to deal with emotional issues.¹⁴⁴

Although, at present, ADR programs are only infrequently available in probate disputes nationwide, a number of jurisdictions are in the process of integrating ADR into their court systems as a whole. Middlesex County, in Massachusetts, has recently introduced the Middlesex Multi-Door Courthouse ("MMDC"), which is a program that sponsors several alternatives to litigation. The program director, Barbara Stedman, explains that cases are sent to mediation by a number of sources including judges, attorneys, and parties.¹⁴⁵ Stedman emphasizes the fact that success of mediation often depends on the acquiescence of both sides.¹⁴⁶ However, mediation may be ordered by some judges at the pretrial conference, even if the parties are reluctant. Stedman indicated that she saw no reason not to use mediation in probate disputes, although this use had not yet been formally attempted under the MMDC program.¹⁴⁷

139. See *id.* at 477.

140. See Gary, *supra* note 115, at 435.

141. See *id.* at 436.

142. See Moon, *supra* note 136, at 481.

143. See Gary, *supra* note 115, at 436.

144. See *id.* at 440.

145. Telephone Interview by Tracey Bulger with Barbara Epstein Stedman, Director of Middlesex Multi-Door Courthouse program, Middlesex County, Mass. (Mar. 8, 1998) [hereinafter Stedman Interview].

146. See *id.*

147. See *id.*

Stedman also notes that the MMDC model emanated from public concern over the problem of congestion in the court system, individuals' lack of faith in the judicial system, and the recognition that "adjudication alone could not adequately accommodate the wide range of disputes and disputants seeking assistance in the courts."¹⁴⁸ The MMDC program is based on the assertion that "the ideal courthouse of the future would serve as a dispute resolution center."¹⁴⁹ Stedman envisions a court system composed of two units: a screening (intake) unit to assess the situation and a unit consisting of the various ADR forums. Once the screening process has been completed, the MMDC program also takes into account the qualifications of the neutral mediators, the composition of the panels, ADR options, and program evaluations.¹⁵⁰

Since its inception in 1990, the MMDC program has progressively gained acceptance. However, despite the growing use of ADR in Massachusetts, the MMDC and similar programs have not yet been completely merged into the state's court system and are not being used formally in the probate courts.

E. Incorporating ADR into Existing Probate Court Systems: Pros and Cons

Gary proposes several recommendations for developing successful ADR programs in probate so that they may become more widespread. She urges that more mediators be trained, particularly in the vocabulary and issues of probate cases.¹⁵¹ She notes that mediation is especially successful in situations in which the following characteristics are present: (1) the parties would benefit from an ongoing relationship; (2) the parties are willing to participate; (3) the parties are competent to mediate; (4) the parties desire confidentiality; (5) the dispute involves nonlegal as well as legal issues; and (6) the power imbalances are minimal.¹⁵²

In contrast to Gary's specific enumerations of the issues, Stedman addresses the overall problem of institutionalizing ADR programs in the courts. Stedman identifies the need to provide an initial assessment of the requirements of a particular court system. This assessment could be accomplished by creating committees to set realistic goals.¹⁵³

Stedman also poses questions that must be considered before ADR

148. BARBARA EPSTEIN STEDMAN, *THE MIDDLESEX MULTI-DOOR COURTHOUSE: A MODEL FOR COMPREHENSIVE ADR SERVICES I* (1996).

149. *Id.* at 2.

150. *See id.* at 3.

151. *See* Gary, *supra* note 115, at 438.

152. *See id.* at 441-44.

153. *See* Stedman Interview, *supra* note 145.

programs are established. "Who will sponsor the program?" "What types of cases should the program handle?" "Which ADR options will be provided?" "Under what authority will the program operate?" "How are the neutral panels selected and supervised?"¹⁵⁴

Despite its advantages, mediation may not be suitable for all probate disputes.¹⁵⁵ As Gary asserts, grief may play an active role in the probate dispute itself. Consequently, mediation may be no better for a grieving party than litigation if that party is still grieving while attempting to mediate the dispute. Another issue to be considered is the length of the dispute. Mediation may not be suitable in cases in which open conflict has been ongoing in a family for a number of years before the death of the decedent. As a final point, if there is an imbalance of power between the feuding parties, this may impair the mediator's ability to guide the parties toward an equitable settlement. Even the most capable mediator may not be able to defeat years of domination by one individual over another.

In addition to the few theoretical negatives of routine mediation, there are also some practical difficulties. In our study, full-blown will contests involving testamentary capacity and undue influence accounted for only thirty-one of eighty-two cases appealed during one year.¹⁵⁶ The other cases involved various procedural issues or doctrines of faulty execution or revocation; one was a quantum meruit claim. Thirty-one cases nationwide, over a period of a year, is perhaps too few to draw the attention of those advocating mediation.

However, it is probable that numerous capacity and undue influence cases nationwide during that single year were decided by a probate court or jury and not appealed. One suspects that the number of these cases is considerably higher than those that were appealed. Assuming this to be the case, there would certainly be enough undue influence and capacity cases nationwide to mandate implementation of some sort of mediation system.

Another issue is that, in some cases, courts will not want to refer cases to mediation. For example, research indicates that a single judge in Suffolk County, Massachusetts handles most, if not all, probate matters and that such specialization also occurs in the huge Middlesex County, Massachusetts.¹⁵⁷ It is not clear whether specialized judges would support

154. See STEDMAN, *supra* note 148.

155. See Gary, *supra* note 115, at 440.

156. See Appellate Court Research, *supra* note 36. [One additional case found insane delusion, an offshoot of the capacity doctrine, in the execution of the contestant's (not proponent's) proffered alternative will.]

157. Conversation of the author with Tracey Bulger, March, 1998, regarding her research at Suffolk County Probate Court.

sending their cases to mediation. I am reminded of a conversation I had some years ago with the then Chief Judge of Probate in Plymouth County, Massachusetts, James R. Lawton. I asked Judge Lawton if I could bring members of my Wills class to his courtroom to view a will contest, and he responded that he would *love to have* a will contest—that nearly all of his business involved divorce and custody matters.¹⁵⁸

An educated guess, then, would be that, at least in Massachusetts, the few probate judges that actually hear will contests (and then only sporadically) have no particular interest in farming such cases out to mediation. The problem, of course, is that when they do hear these cases, they almost always find for the proponent.

If the answer to the problems associated with probate disputes is a systemwide policy of referral to mediation, legislation may be required. As discussed, Hawaii and Oregon have taken serious steps to include will contests in their ADR programs¹⁵⁹ and Oregon has taken the further step of creating two types panels for such mediation.¹⁶⁰ This approach recognizes that, although probate disputes do involve emotional issues, they may also involve more technical issues. It may be that existing mediation panels, such as that in Middlesex County, Massachusetts, are ill-equipped to handle probate matters when they involve technical and financial issues in addition to emotional ones.

Despite these concerns, ADR programs, particularly mediation, would be a worthy addition to the justice system in general and the probate courts in particular. ADR can help minimize the congestion in our courts while simultaneously helping to reconcile families. The following passage summarizes why we should turn more frequently to ADR to settle our disputes, including will contests:

Too often litigation plans consist of reacting to the other side through a routine pattern of document discovery, fact witness depositions and (un)dispositive motions. Full attention comes only as deadlines for experts and trial force the case to the front of a litigator's desk. Early assignment to ADR provides guidance to the parties on the crucial disputes and uncertainties that bar settlement and forces them to resolve those issues in a timely fashion. The process should isolate the issues, force the parties to investigate the facts or seek resolution or clarification of the legal question, and then return reasonably quickly to re-evaluate their positions.¹⁶¹

158. Telephone Conversation of the author with James R. Lawton, Former Chief Judge of Plymouth County Probate Court, Plymouth County, Mass. (probably 1990).

159. See Gary, *supra* note 115, at 435-36. See also Moon, *supra* note 136, at 477.

160. See Gary, *supra* note 115, at 437. See also text accompanying *supra* note 144.

161. See Campisi, *supra* note 125, at 53.

VI. CONCLUSION: NON-LAWYER DECISION MAKING MAKES SENSE IN WILL CONTESTS

However well probate judges may "move will contests along," they may appear to, on the whole, sacrifice justice in doing so, given their marked propensity to find for will proponents. In contrast, trial by jury provides will contestants a much better chance of winning. Thus, a probate court system that offers both alternatives for trying cases seems to be the fairest solution.

Regardless of how well the right to trial by jury may "level the playing field" between proponent and contestant, it must be admitted that jury trials are typically lengthier and more costly than are bench trials. In addition, there is always the possibility of numerous reversals by the appellate courts, particularly of jury verdicts for contestants.¹⁶² Such reversals are costly for the litigants as well as for the court system itself. However, my nationwide analysis shows that a number of judges' decisions for proponents are themselves being reversed for contestants.¹⁶³ Perhaps it is not too much to conclude that appellate courts in will contests are quite vigilant in policing judges' overwhelming predilection to decide for proponents as well as juries' somewhat milder tendencies to find for contestants. If this is the case, the system for finally deciding will contests will remain costly and slow, regardless of whether judges or juries make the initial decision.

The disagreements between judges and juries as to whether a given case shows lack of testamentary capacity or undue influence begin with the doctrines themselves. These are vague doctrines, the requirements of which really call for case-by-case factual analysis. In many cases, such analysis may be better done by juries than by judges, because juries appear to focus on what seems most important: who among competing legatees gets what and whether this distribution is just. Because the law muddles this determination by emphasizing the undue influence and lack of testamentary capacity doctrines' mandate to find the true intent of the testator regardless of the justice of the disposition, judges may well be focused more on what the dead testator *actually wanted* than are juries. While testamentary intent is relevant to the ultimate distribution of the estate, this inquiry is less compelling than is the apparent emphasis that juries put on the fairness of the distribution itself.

One can certainly quarrel with my preference for outcome-based

162. See text accompanying *supra* note 52.

163. See text accompanying *supra* note 38.

jury verdicts over judicial decisions that protect the "dead hand." The judicial system's confusion as to which direction it should take in cases of undue influence and lack of testamentary capacity may be based on a conflict between the lay and legal views of what is really important to decide. What better breach for mediation to step into than one in which the system is at war with itself.

Mediation often brings if not a lay, then at least a non-lawyer's perspective to bear on the family crisis of a will contest. It does so in a way that enables the parties to reach a result in which each has an investment. Given the emotional dimensions of the typical will contest, the skillful mediator may enable the parties to find win-win solutions as an alternative to submitting to judicial win lose decisions, which may further rend the fabric of the family involved. In mediation, the family's sense of what is just can be brought to bear in reaching the final decision.

The second-best method would be to have a jury impart the *community's* sense of what a typical family might feel is fair. Although mediation is preferable to a jury verdict, a jury verdict is preferable to a *judicial* attempt at resolution that focuses in large on the state of mind of a dead testator.

I believe the best system of resolving will contests involves routine referral to mediation first, with the understanding that, if mediation fails, the parties have the right to appear before either judge or jury. This system works well in Atlanta, Fulton County, Georgia and should work equally well in other probate courts nationwide. Because law-trained individuals, be they attorneys or judges, may be loathe to surrender their involvement in will contests and may actively resist such a change, the public itself must push for this type of program. At the same time, those lawyers who admit the superiority of the "mediation first" system can join it, by training themselves in the techniques of mediation. Likewise, judges may come to see the wisdom of letting mediators have "first crack" at these emotional family matters; certainly, the system in place in Atlanta saves judicial time and effort. In summary, law-trained individuals can learn new tricks and mediation in will contests is one such trick; if enough individuals are willing to learn how to mediate, a program like that used in the Atlanta probate system can be instituted nationwide.

